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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 665.

ALBERT L. WIELAND,
Also known as A. L. WIELAND, as Receiver,
Petitioner,

vs.

HARRY E. PAGE,
Respondent.

REPLY BRIEF OF PETITIONER.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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It is contended by plaintiff's counsel that the Supreme Court of Ohio did not consider or pass upon the federal question. The application for rehearing filed in the Supreme Court of Ohio admittedly raised the very questions relied upon in the petition for writ of certiorari here. (Respondent's Brief, pages 6, 7, and 8.) The federal question was therefore presented to the Supreme Court of Ohio by the application for rehearing. Its denial thereof necessarily denied the plaintiff's claim that his federal constitutional rights were denied.

The plaintiff further contends (Brief, page 3) that he introduced the ordinances set forth in his pleadings. This is not the record. The opinion of the Supreme Court of Ohio clearly indicates that the ordinances were not introduced. It was the opinion of the court that the ordinances were in evidence not because of their introduction by the plaintiff, but because it concluded that defense counsel's waiver of the requirement for calling the city clerk to produce the ordinances was tantamount to their admission. That this was an erroneous conclusion is apparent from the trial court's statement for the record:

"The Court: The record may show at this time you are waiving the right to have the Clerk of the Council come down.

Mr. McNeal: That is true.

The Court: Now, all other questions are reserved until after the evidence is heard." (R. 22-23.)

Again at page 5 of his brief, Respondent's counsel states that the court gave the jury the substance of the ordinances and their legal effect, but this is not sufficient. It is settled law in Ohio, as the court below itself has said, that an ordinance unless admitted by the pleadings or in open court by the parties must be presented like a foreign state statute. (Opinion of Supreme Court of Ohio, R. 48.) So that giving the jury the substance of the ordinances and their legal effect did not give them an opportunity to learn the exact terminology of the ordinances, the "basic facts" necessary for its consideration before the defendant could be legally charged with negligence.

The plaintiff cites *Robertson and Kirkham on Jurisdiction of the Supreme Court of the United States*, page 121, Note 41. It is noteworthy that the same author states in the same note the following:

> "Where the record filed in the Supreme Court is unprinted, counsel who intend to rely upon the doctrine of the 'surprise' cases, should so advise the clerk of the Supreme Court. Otherwise in printing the record he may omit the petition for rehearing if it was denied without more pursuant to the general order of the court requiring him to omit immaterial matter."

The record in the instant case was printed and certified by the court below and we contend sufficient compliance was had with the rule. Especially is this so in view of counsel's admission in his Brief at pages 6, 7 and 8 that the federal question was raised on defendant's application for rehearing in the Supreme Court of Ohio, and that said application included the present claim.

The plaintiff contends that *City National Bank v. Durr*, 257 U. S. 99, does not support defendant's position that raising the federal question upon application for a rehearing in the State Supreme Court is timely to support certiorari. We, therefore, quote from page 106 of that case as follows:

> "After the final decision in an application to The Supreme Court for a rehearing, plaintiff for the first time asserted that the decision if adhered to rendered the Ohio Taxation statutes invalid because of such repugnance. This application was denied without reasons given and hence must be regarded as having come too late to raise any question for review by this court. (Citations.) Therefore, a writ of error allowed by the Chief Justice of the Supreme Court must be dismissed because not the proper mode of review under Paragraph 237, Judicial Code, as amended by Act of Sept. 6th, 1916, C. 448, 39 Stat. 726. But an application for the allowance of a writ of certiorari, made to this court under the same section, consideration of which was postponed until the hearing on the writ of error, will be granted and the case determined thereunder."

We reiterate that up to the time when the Supreme Court of Ohio ruled against the defendant and rendered its opinion, the defendant was successful except for the judgment entered against him in the *nisi prius* court. Not only is it the contention that the trial court erred in considering ordinances without formally admitting them into evidence, but serious error occurred which deprived the defendant of due process when the court failed to rule on his objections to such ordinances and thereafter commented upon them and charged the jury thereon. Even after defendant's counsel called the attention of the court to the error committed by saving an exception to that part of the court's charge in which reference was made to the municipal ordinance (R. 35) the court did nothing to correct the error.

Questions were raised in the Supreme Court of Ohio at the first opportunity offered the defendant. Since the Court of Appeals ruled favorably upon the defendant's contention he was not obliged to raise the question in the Supreme Court until after an adverse ruling was made against him.

Respectfully submitted,

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